

BEFORE THE BOARD OF MEDICAL EXAMINERS  
OF THE STATE OF ARIZONA

In the Matter of

**KENNETH M. FISHER, M.D.**  
Holder of License No. 12762  
For the Practice of Medicine  
In the State of Arizona.

Re: Investigation No. 10633

No. 99F-10633-MDX

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

1. On September 24, 1999, this matter came before the Arizona Board of Medical Examiners (Board) for oral argument and consideration of the Administrative Law Judge's (ALJ) proposed Findings of Fact, Conclusions of Law and Recommended Decision.<sup>1</sup> (Attached hereto is a copy of the ALJ's Findings of Fact, Conclusions of Law and Recommended Decision.) Kenneth M. Fisher, M.D. appeared and was represented by counsel, Calvin L. Raup, Esquire. The State was represented by Assistant Attorney General Gordon S. Bueler. The Board was advised by Assistant Attorney General Thomas Dennis of the Solicitor General and Opinions Section of the Attorney General's Office.

2. The Board, having considered the ALJ's proposed Findings of Fact and Conclusions of Law and the entire administrative record in this matter, hereby issues the following Findings of Fact, Conclusions of Law and Order.

**FINDINGS OF FACT**

1. Respondent is the holder of License No. 12762 issued by BOMEX for

<sup>1</sup> The Administrative Hearing was conducted over 14 days commencing on February 22, 1999. The record was closed on July 26, 1999.

1 the practice of medicine in the State of Arizona.

2 2. Respondent is a board certified general family practitioner.

3 3. Respondent is an internationally renowned expert in the treatment of HIV  
4 and AIDS. He is on the cutting edge of research and treatment of those diseases.

5 4. Respondent's patient population has included, and presently includes, gay  
6 men and lesbians.<sup>2</sup> A significant number of those patients are either HIV-positive or have  
7 AIDS.

8 5. Respondent has treated, and continues to treat, heterosexual patients.  
9 Respondent has treated a number of those patients for HIV-positive issues and AIDS.

10 6. Respondent's practice also includes the treatment of minor children.  
11 Respondent has treated minor children patients who were diagnosed as HIV-positive and  
12 other with AIDS.

13 7. On April 18, 1996, Respondent voluntarily agreed to a Stipulation and Order  
14 (Order) with the Arizona Board of Medical Examiners (BOMEX). The Order resolved  
15 BOMEX's Investigation No. 8797 into a complaint made by patient J.F., who alleged that  
16 Respondent sexually fondled and touched him during a physical examination. Under the  
17 Order, Respondent agreed to "obtain a chaperone for all patient physical examinations  
18 he performs in his office. He (Respondent) shall require that the chaperone sign his or  
19 her name in the chart for each physical examination." Respondent acknowledged that  
20 any violation of the Order was "unprofessional conduct."

21 8. On May 14, 1996, Respondent signed a "Chaperone Assistance Policy" for  
22 his medical office. The policy states:

23 As defined by the regulatory authorities, a physical examination  
24 includes a private session with a patient that requires the Physician  
25 and patient to be physically present. Although this is considered an  
unnecessarily broad and restrictive definition, it is nevertheless

---

<sup>2</sup> This finding was amended to omit the redundancy: "lesbian women."

1 incumbent upon us to ensure compliance so that at no time are the  
2 Physician and patient alone.

3 Therefore, effective immediately, it shall be the policy of First Medical  
4 Group that there be a medically trained assistant present during every  
5 medical examination, review or discussion with a patient by a  
6 Physician or Physician's Assistant. The records of the patient shall be  
7 initialed and written in hand writing by the chaperone that they were  
8 present during the entire examination...

9 9. Respondent's Chaperone Assistance Policy complies with the spirit and  
10 intent of the chaperone policy set forth in the Order.

11 10. Respondent has admitted that he violated the Order and his office's  
12 Chaperone Assistance Policy requiring that a chaperone be present for all office visits. In  
13 a June 16, 1997, letter, Respondent stated:

14 I am aware of and admit, that now looking back, the manner and  
15 extent to which I initially attempted to comply with the agreement was  
16 both inadequate and even at times dogmatic. However, I can assure  
17 you that it was my intent to have a chaperone available with me  
18 during all patient visits. Unfortunately, I was not always perfect in  
19 that regard and occasionally allowed the demands and requests of  
20 the patient to override my judgment. I found myself responding to  
21 patient request to carry out the subjective portion of the visit privately.

22 11. Former employees of the Respondent, including Debra Barrios, Jodie  
23 DeMarco, Paula Sims and Chad Schroer, N.M.D., all credibly testified that while they  
24 worked in Respondent's office after the Order<sup>3</sup> Respondent did not have chaperones  
25 present for all patient office visits.

12. Patients D.B. and J.T. testified that Respondent examined them without a  
chaperone after the effective date of the Order.

13. On May 19, 1999, Respondent's polygraph examiner, Cy Gilson, testified  
that Respondent admitted to him that he had seen patients alone without chaperones  
present.

---

<sup>3</sup> Corrected for typographical error.

1           14.    At the administrative hearing, Respondent testified that he told the  
2 chaperones to stand outside the examination room while he saw patients, but left the  
3 door ajar.

4           15.    Respondent also testified that he used curtains to shield himself and the  
5 patients from the chaperones, but that the chaperones were able to view activities on the  
6 other side of the curtain by looking at the reflections of pictures hanging on the walls of  
7 the examination rooms.

8           16.    It is determined that the exclusion of the chaperones as described in  
9 Finding of Fact No. 14 above and the use of the curtains to shield the chaperone as  
10 described in Finding of Fact No. 15 do not comply with the Order that chaperones be  
11 present when the Respondent examines patients.

12          17.    A survey of patient charts conducted by BOMEX revealed that Respondent  
13 violated the Order by failing to document the presence of chaperones by obtaining initials  
14 or signature for examinations of patients on 57 separate occasions for the period  
15 between April 1996 and March 1997.

16          18.    The patient charts of D.B. and J.T. reflect examinations performed by  
17 Respondent without chaperone notations.

18          19.    Respondent blatantly violated the chaperone order, to wit: Having  
19 chaperones stand outside while only leaving the door ajar.<sup>4</sup>

20          20.    The chaperone policy protects both the physician and the patient.

21          21.    Respondent acknowledged he crossed sexual boundaries with gay male  
22 patients.<sup>5</sup>

23          22.    Because of those boundary issues, Respondent now acknowledges that  
24 some of his actions during examinations could have been perceived differently by his  
25 patients than he did.

---

<sup>4</sup> This finding was amended to more accurately reflect the Board's review of the evidence.

<sup>5</sup> This finding was amended to more accurately reflect the Board's review of the evidence

1           23.     Respondent created a social aspect of his medical office that allowed  
2 inappropriate sexuality among himself and his gay male patients in the medical setting.

3           24.     Respondent sexualized patient office visits through sexual talk beyond  
4 medically necessary communication between physician and patient.

5           25.     R.G. became Respondent's patient in the 1980's and ended his treatment  
6 with Respondent in 1996. During physical examinations, particularly later in R.G.'s  
7 treatment with Respondent, R.G. believed that Respondent fondled his testicles in a  
8 manner inconsistent with standard practice for patient examinations.

9           26.     R.G. perceived that Respondent placed his genital area on R.G.'s knee or  
10 buttock during a medical examination.<sup>6</sup>

11          27.     R.G. perceived that Respondent made the following statement to him prior  
12 to performing a rectal examination: "Just pretend that this is a big black man." While  
13 there is a disagreement as to the exact language used by Respondent during that  
14 examination, such a statement during a rectal examination is deemed to be inappropriate  
15 sexualization by Respondent.

16          28.     D.B. was a patient of Respondent's from June 1990 to December 1996.  
17 During office examinations, Respondent frequently made sexually suggestive jokes and  
18 comments to D.B. There is insufficient evidence to support a finding that Respondent  
19 grabbed D.B.'s genitals in an inappropriate manner during a physical examination or that  
20 Respondent kissed D.B.'s buttocks after administering an injection into D.B.'s buttocks.  
21 However, it is found that Respondent's manner of performing the physical examination  
22 and the administration of the injection left D.B. uncomfortable with those procedures.

23          29.     S.H. was Respondent's patient from April 1994 to October 1996. During  
24 that time S.H. was also being treated by Chad Schroer, N.M.D., who was employed at  
25 Respondent's clinic. Respondent examined S.H. only one time as a reasonable and

---

<sup>6</sup> This finding was amended to more accurately reflect the Board's review of the evidence, and its view is that such actions are inappropriate.

1 medically appropriate practice prior to Dr. Schroer treating S.H. There is insufficient  
2 evidence that Respondent fondled S.H.'s testicles in a non-medically required manner or  
3 performed an improper prostate examination. However, there is reasonable and credible  
4 evidence that Respondent's performance of the examination made S.H. feel that non-  
5 consensual sexual improprieties had occurred during the physical examination.

6 30. Respondent first saw J.T. as a patient in October 1995. There is insufficient  
7 evidence of record to support findings that Respondent inappropriately fondled J.T.'s  
8 penis and testicles in a medically inappropriate fashion at the initial physical examination;  
9 however, there is sufficient evidence that on at least one occasion Respondent  
10 manipulated J.T.'s prostate until J.T. experienced an erection.<sup>7</sup>

11 31. On or about September 6, 1994, Respondent conducted a physical  
12 examination of R.R. at his medical office. Respondent examined R.R. after instructing  
13 him to remove his clothes and dress in a patient gown. During the examination,  
14 Respondent examined R.R.'s penis. R.R. experienced a full erection. There is  
15 insufficient evidence that Respondent performed an inappropriate physical examination  
16 with the intention of sexually arousing his patient.<sup>8</sup>

17 32. During his testimony at the administrative hearing, Respondent could not,  
18 nor did, state that patient R.R.'s allegations were wrong, only that R.R.'s "perception of  
19 sexualization" was different than Respondent's intent. Respondent is found to be at fault  
20 for that misperception.

21 33.<sup>9</sup> Patient A.M. visited Respondent's medical office on three occasions,  
22 beginning in July 1997. A.M. originally met with Respondent to decide if he wanted to  
23 select Respondent as his primary care physician. There is insufficient evidence that  
24

---

25 <sup>7</sup> This finding combines the ALJ's proposed findings #30 and #31, and more accurately reflects the Boards review of the evidence. The board also omitted proposed findings #32 and #33 concerning J.T. because they state only what was not found, and there is no need to state the negative.

<sup>8</sup> The board omitted proposed findings #35 and #36 concerning R.R., because they state only what was not found and there is no reason to state the negative.

1 Respondent performed any inappropriate examinations of A.M., although it is determined  
2 that Respondent's action did contribute to A.M.'s reasonable "perception of sexualization"  
3 during those examinations.

4 34. Respondent has acknowledged boundary issues and has obtained  
5 appropriate therapy.

6 35.<sup>10</sup> Respondent has a sexual disorder that led to numerous patients perceiving  
7 they had been sexually victimized or violated. Several patients reported sexual arousals  
8 during or after exams, several patients reported inappropriate sexual innuendoes directed  
9 toward them by the Respondent during physical exams, and several patients reported the  
10 perception of having been inappropriately touched. Respondent's therapy for this  
11 disorder will be ongoing for a long period of time, possibly for the duration of his medical  
12 career.<sup>11</sup>

13 36.<sup>12</sup> Respondent and his patients are entitled to the statutory privilege provided  
14 by A.R.S. § 32-1451.01.

15 37. There is sufficient evidence of record to support a decision to impose  
16 serious discipline.<sup>13</sup>

17 38.<sup>14</sup> The terms and conditions of the Stipulation and Order dated April 18, 1996  
18 require that whenever Respondent is with a patient in a "one-on-one" situation, he needs  
19 to have a chaperone who must properly document the visit.<sup>15</sup>  
20  
21  
22

---

<sup>9</sup> The Board omitted proposed finding #38 concerning C.K. for the same reasons stated in Footnote #8.

<sup>10</sup> The board omitted proposed finding #41 because they did not agree with it.

<sup>11</sup> This finding restates proposed finding #42 to more accurately reflect the Board's review of the evidence.

<sup>12</sup> The Board omitted proposed Findings #'s 43-46 because it does not agree with the factual assertions and the findings include inappropriate comments on the Board's legal duties that don't constitute factual determinations.

<sup>13</sup> This finding replaces proposed finding #48, which included an irrelevant statement concerning summary suspension and did not reflect the board's view on the seriousness of the activity found.

<sup>14</sup> The Board omitted proposed findings #'s 49-51 and 53 because they were not proper factual statements, but were comments on the sanction with which the Board disagrees.

<sup>15</sup> This finding restates proposed finding #52 to more accurately reflect the Board's review of the record. Also, the Board omitted proposed finding #54 as unnecessary.

1  
2  
3  
~~4~~  
5  
6  
7  
8  
9  
0  
1  
2  
3  
~~4~~  
5  
5  
7  
3  
9  
)

2  
3

4  
5  
6

7  
8  
9  
0

- 1
- 2
- 3

55

7

39

1

1

11



1 A. Respondent shall comply with the terms and conditions of the Stipulation  
2 and Order dated April 18, 1996, which are incorporated herein by reference and  
3 clarified to require that the chaperone's view be unencumbered. Every term of the  
4 probation is mutually exclusive and is imposed to protect the public. Any violation  
5 of the probation would pose an immediate threat to the public health and safety.

6 B. Respondent shall continue to be treated by healthcare professionals  
7 approved by Board staff at his sole expense and shall execute any necessary  
8 releases to allow BOMEX access to his healthcare records. Respondent shall also  
9 submit to any future course of treatment required by BOMEX deemed necessary to  
10 protect the public health and safety.

11 C. Any violation of the terms and conditions of this order will result in summary  
12 suspension, and any violation proved after hearing will result in revocation of the  
13 Respondent's license.

14 D. Pursuant to A.R.S. § 32-1451(L), Respondent shall pay to the Board costs  
15 for formal hearings in the sum of Eighteen Thousand, Four Hundred Nineteen  
16 Dollars and Ninety-nine cents (\$18,419.99), to be paid within thirty-six (36) months  
17 from the date of this Order.

18 \* \* \* \*

19 RIGHT TO PETITION FOR REVIEW

20 1. The parties are hereby notified that they have the right to petition for a  
21 rehearing. Pursuant to A.R.S. § 41-1092.09, as amended, the petition for rehearing must  
22 be filed with the Board's Executive Director within thirty (30) days after service of this  
23 Order and pursuant to A.A.C. R4-16-102, it must set forth legally sufficient reasons for  
24 granting a rehearing. Service of this Order is effective five (5) days after the date of  
25

---

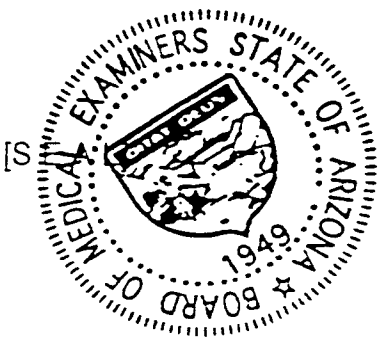
<sup>18</sup> The board omitted proposed conclusion of law #'s 7-10 and added this conclusion to reflect its view of the Board's authority.

1 mailing.

2        2.        The parties are further notified that the filing of a petition for rehearing is  
3 required to preserve any rights of appeal to the superior court that they may wish to  
4 pursue.

5 \* \* \* \*

6 ISSUED this 29<sup>th</sup> day of September, 1999.



BOARD OF MEDICAL EXAMINERS  
OF THE STATE OF ARIZONA

10 By:   
11 CLAUDIA FOUTZ  
12 Executive Director  
13 TOM ADAMS  
14 Deputy Director

14 Original of the foregoing filed this  
15 29<sup>th</sup> day of September, 1999, with:

16 The Arizona Board of Medical Examiners  
17 1651 East Morten, Suite 210  
18 Phoenix, Arizona 85020

18 Copies of the foregoing mailed  
19 certified return receipt requested  
20 this 29<sup>th</sup> day of September,  
21 1999, to:

21 Calvin Raup, Attorney at Law  
22 Goodwin Raup PC  
23 3636 N. Central, Suite 1200  
24 Phoenix, Arizona 85012-1942

24 Kenneth M. Fisher, M.D.  
25 1444 West Bethany Home Road  
Phoenix, Arizona 85013